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88-6009

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

EDDIE A. CRAWFORD,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION
FOR RESPONDENT

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QUESTION PRESENTED

I.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the trial court properly denied Petitioner's motion for change of venue at Petitioner's retrial?

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PART ONE

STATEMENT OF THE CASE

(i)

The Petitioner, Eddie A. Crawford, was indicted, tried and convicted of murder in March, 1984, in the Superior Court of Spalding County. Petitioner was sentenced to death. On direct appeal, the conviction and sentence were reversed because of the possibility that Petitioner was convicted of a crime not charged in the indictment. Crawford v. State, 254 Ga. 435, 330 S.E.2d 567 (1985). On remand, Petitioner contested the state's ability to seek the death penalty a second time. Petitioner pursued an interlocutory appeal to the Supreme Court of Georgia where the Court held that the state was not prohibited from seeking anew the death penalty. Crawford v. State. 256 Ga. 57, 344 S.E.2d 215 (1986).

Following a trial by jury in January and February, 1987, Petitioner was found guilty of felony murder. (Transcript 1614). After a separate proceeding was held to determine what punishment would be imposed, the trial jury found the existence of three statutory aggravating circumstances according to state

law and sentenced Petitioner to death. (Trial Record 96-97). On direct appeal, the Supreme Court of Georgia affirmed the conviction and sentence. Crawford v. State, 257 Ga. 681, 362 S.E.2d 207 (1987). A motion for reconsideration of its decision was denied by the Court on December 16, 1987. Crawford v. State, 257 Ga. at 690. Thereafter, Petitioner filed the instant untimely petition for a writ of certiorari in this Court.

(ii)

The facts of the case, as established by the evidence at trial and as succinctly reiterated on direct appeal reveal that the Petitioner, who was recently separated from his wife, unsuccessfully propositioned his wife's sister. When she turned Petitioner down, Petitioner threatened to "get" her. Later that evening, Petitioner abducted, raped and murdered her 29 month old daughter. Crawford v. State, 257 Ga. at 682.

During the investigation of the crime, officers interviewed the Petitioner about his actions. In the first statement given to officers, Petitioner denied involvement. (T. 1402, 1403, 1429). In a second interview, Petitioner admitted being at a stop sign with the victim in his lap on the night she was abducted. Further, Petitioner stated that the victim would not talk to him and would not wake up. (T. 1431-1432). In a third interview, Petitioner again admitted that the victim was in his car and on his lap the night that she was abducted. Petitioner also remembered walking down the road with the victim in his arms. (T. 1434-1438). In addition to admissions by the Petitioner, scientific evidence as well as the testimony of various state witnesses implicated Petitioner.

After considering all of the evidence presented by the state, the jury sentenced the Petitioner to death. The Supreme Court of Georgia determined that according to the standards established in Jackson v. Virginia, 443 U.S. 307 (1979), the

evidence was sufficient to support the conviction. Crawford v. State, 257 Ga. at 682-683. Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court.

TIMELINESS OF THE PETITION

Petitioner was found guilty of felony murder and sentenced to death on February 6, 1987. Thereafter, Petitioner's counsel, August F. Siemon, did not file a motion for a new trial or a notice of appeal. Because the death penalty was imposed the Georgia Supreme Court automatically docketed Petitioner's direct appeal on April 16, 1987. The Court considered issues briefed by the parties and affirmed the conviction and sentence on November 19, 1987. Crawford v. State, 257 Ga. at 690. A motion for reconsideration was denied by the Court on December 16, 1987.

In April, 1988, the remittitur from the Supreme Court of Georgia was received and made the judgment of the trial court.

In November, 1988, upon a state wide review of cases involving the death penalty, counsel for Respondent observed that no action had been taken in the instant case since the motion for reconsideration was denied. Accordingly, to expedite the judicial process, counsel for Respondent, by letter dated November 17, 1988, contacted Petitioner's last counsel of record and informed counsel that an execution date would be set if post conviction proceedings were not instituted prior to December 1, 1988. (Respondent's Exhibit 1).

After counsel for Respondent authored the letter of November 17, addressed to Petitioner's last counsel of record, a petition for writ of certiorari was filed on behalf of Petitioner on November 30, 1988.

According to Rule 20.1 of this Court, a petition for writ of certiorari to review the judgment in a criminal case should be submitted within 60 days after the entry of judgment. The clerk should refuse to receive any petition which is not submitted within the jurisdictional time limit.

It is clear from the record and exhibits submitted by Respondent that after Petitioner's conviction was affirmed in

November and a motion for reconsideration was denied in December, 1987, Petitioner took no further action until Respondent notified Petitioner that an execution date would be sought. In his petition for a writ of certiorari, counsel for Petitioner claims that the reason no action was taken was that Petitioner was not represented by counsel from December, 1987, until October, 1988. Even if correct, counsel's statement does not justify this Court's waiving jurisdictional requirements and allowing the untimely petition. First, as the Court is aware, a Petitioner need not be represented by counsel to submit a petition for writ of certiorari to the Court. However, if the Court considers it justifiable that Petitioner allegedly waited until obtaining representation by counsel, Respondent notes that counsel talked with Petitioner on October 14, 1988. No notice was given to counsel for Respondent that Petitioner was represented by different counsel; no pleadings were filed with the Court informing the Court that an untimely petition for writ of certiorari would have to be filed because Petitioner was allegedly previously unrepresented by counsel, and no action was taken between October 14, and November 30, 1988. Again, Respondent notes that a petition for writ of certiorari was only filed after counsel for Respondent let it be known that a new execution date would be set on December 1, 1988.

Because it is obvious from the record that Petitioner delayed in pursuing judicial remedies until counsel for Respondent indicated that a execution date would be set, Respondent submits that this Court should not sanction Petitioner's deliberate attempt to forestall implementation of the sentence in this matter. Respondent request that the Court not waive its jurisdictional requirements, but rather that the petition be dismissed based on a lack of jurisdiction.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT A CHANGE OF VENUE WAS NOT WARRANTED AT PETITIONER'S RETRIAL.

Petitioner contends that the Georgia Supreme Court improperly determined that a change of venue was not warranted at Petitioner's retrial. Petitioner contends that in so holding, the Supreme Court of Georgia applied a standard which violates due process. Accordingly, Petitioner believes that a writ of certiorari should be granted. Respondent submits that the Supreme Court of Georgia's decision is proper and based upon long standing decisions of this Court.

As revealed by the statement of the case, Petitioner was first convicted and sentenced in 1984. After proceedings on direct appeal which resulted in a reversal, and after proceedings on an interlocutory appeal, Petitioner was again tried and convicted in February, 1987, nearly three years after the date of the first conviction. Notwithstanding the length of time between the original conviction and retrial, Petitioner's counsel filed a motion for change of venue. After considering argument on the motion and the applicable law, the trial court found that 50 prospective jurors were qualified for trial. (T. 1126). The trial court observed, during the voir dire process, the lack of an atmosphere in the community permeated with prejudice. (T. 1129). The trial court noted the lack of any evidence of recent publicity and stated that the only testimony concerning publicity was from some of the prospective jurors who made mention of a brief news account about the retrial. (T. 1130). The trial court described the atmosphere of voir dire examination as follows:

> The jurors would come into this room... and sit down next to me, probably no more than 36 inches separating my face to the jurors' face, and go through 20 to 45 minutes of intense searching questions about knowledge or facts about ethical and moral issues and about how their mind might react in different circumstances... .

(T. 1131). After considering the evidence presented on the motion for change of venue, and observing the demeanor of the prospective jurors, the trial court refused to assume that the legal system was incapable of handling cases that are newsworthy and denied Petitioner's motion for a change of venue.

On direct appeal, the Supreme Court of Georgia reviewed the entire voir dire record and the trial court's decision and agreed that the setting of the trial was not inherently prejudicial nor did the jury selection process show actual prejudice. Crawford v. State, 257 Ga. at 683.

Under Georgia law, a change of venue may be secured upon proper motion whenever an impartial jury cannot be obtained in the county where the crime was committed. In order to secure a change of venue for pretrial publicity related reasons, or because of the fixed opinions of prospective jurors, a defendant must show one of the following:

> (1) that the setting of the trial was inherently prejudicial or,
>
> (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible.

Chancey v. State, 256 Ga. 415, 349 S.E.2d 717 (1986). The above standard is based upon this Court's decision in Murphy v. Florida, 421 U.S. 794 (1975). See Street v. State, 237, Ga. 307, 311, 227 S.E.2d 750 (1976). In Murphy v. Florida, this Court concluded that the Cnstitution requires that a defendent have a panel of impartial, indifferent jurors. Id. at 799. To determine if such a jury panel has been acquired, a court will look to see if there is actual prejudice against the defendant to a degree that rendered a fair trial impossible. Murphy v. Florida at 798. Additionally, the court of application should look to see if the setting of the trial is inherently prejudicial. Id. at 802-803. In the instant case, following the standard derived from Murphy v. Florida, the Supreme Court of Georgia determined that the setting of the trial was not inherently prejudicial. The Supreme Court made this determination because, from a review of the record, the Court observed relatively little recent publicity with regard to the retrial.

In reviewing the voir dire process, the Court noted that less than 30 perspective jurors were disqualified for bias resulting from prior knowledge of the case. The 50 jurors qualified to constitute the pool from which the trial jury was selected did not have fixed opinions such that they could not judge impartially the guilt of the defendant, or the appropriate punishment, in accordance with this Court's decision in Patton v. Yount, 467 U.S. 1025 (1984). As, during a review of the voir dire, the Supreme Court of Georgia did not see that prospective jurors had fixed opinions such that they could not impartially gauge the guilt of the Petitioner, or impartially resolve the issue of punishment, the Court determined that the jury selection process did not show actual prejudice to a degree that rendered a fair trial impossible. Indeed, a review of the record in the instant case will reveal a lack of "actual prejudice," i.e., a prospective juror stating that Petitioner would have to prove his innocence, or

prospective jurors informing the Court that they believed the Petitioner to be guilty. See Murphy v. Florida, at 798.

Because the Georgia Supreme Court properly determined that the setting of the trial was not inherently prejudicial, and that Petitioner failed to show actual prejudice in the jury selection process, this Court should refuse to grant a writ of certiorari.

CONCLUSION

This Court should refuse to grant the writ of certiorari to the Supreme Court of Georgia as it is manifest that there exists for review by this Court no substantial question not previously decided by this Court. Additionally, the decision sought to be reviewed is in accord with applicable and long standing decisions of the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Eddie Snelling, Jr., a member of the Bar of the Supreme Court of the United States, Counsel of Record for Respondent, hereby certifies that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct of this BRIEF IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI upon counsel for Petitioner by depositing a copy of the same in United States Mail with proper address and adequate postage to:

Mr. Gary A. Alexion
Georgia Appellate Practice and
Educational Resource Center
Georgia State University
College of Law
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Honorable Johnny Caldwell
District Attorney
Griffin Judicial Circuit
P. O. Box 1191
Thomaston, GA 30286

This 30th day of December, 1998.

EDDIE SNELLING, JR.
Assistant Attorney General
Counsel of Record for
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